PP

v.

HARON MUKRI

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL TRIAL NO: 45-4-2006]
4 FEBRUARY 2010

CRIMINAL LAW: *Dangerous drugs - Statutory presumption - Trafficking in dangerous drugs - Custody and control of drugs - Knowledge - Possession - Prosecution relied on statutory presumption under s. 37(da)(iii) of the Dangerous Drugs Act 1952 on first charge - Prosecution made out prima facie case on first and third charges - Defence essentially of bare denial - Whether created a reasonable doubt on prosecution's case - Defence failed to rebut statutory presumption on first charge*

EVIDENCE: *Witness - Discrepancy in evidence - Omission - Whether witness no longer credit worthy - Whether a minor discrepancy*

Acting upon information received, on 24 July 2005 at about 10.50 am, PW6 (DSP Teng Chan Chew) together with his team of officers raided house No. 33, Kampung Parit Tegak, Parit Sulong, Batu Pahat. There PW6 saw the accused sitting on an overturned bucket/pail in front of a table. PW6 and his team approached the accused from the rear. PW6 identified himself. The accused appeared shocked and stunned. On the table were several items suspected by PW6 to be prohibited items. He found and seized on the table, one red plastic bag and one sling bag carrying the 'Levi's' brand name containing transparent plastic packets containing yellowish substances suspected to be heroin. These items formed the basis of the first charge against the accused. He also found one white plastic packet 'ubat', inside of which were five transparent plastic packets containing substances suspected to be syabu. These items formed the basis of the third charge against the accused. The accused together with the incriminating exhibits were brought back to Balai Polis Batu Pahat. A report on the accused's arrest and the seizure of said exhibits was lodged by PW6 (exh. P16). The accused was charged under (i) s. 39(B)(1)(c) of the Dangerous Drugs Act 1952 ('DDA') for trafficking in 45.08

A grammes of monoacetylmorphines and punishable under s. 39B(2) of the same Act; (ii) s. 6 of the DDA for having in his possession 83.79 grammes of cannabis and punishable under s. 39A(2) so of the same Act; and (iii) s. 12(2) of the DDA for having in his possession 5.43 grammes of methamphetamine and punishable under
B s. 39A(1) of the same Act. The accused was acquitted and discharged of the second charge at the close of the prosecution's case.

Held (convicting the accused of offences in respect of the first
C **and third charge):**

(1) Upon the facts and evidence adduced, with respect to the first and third charge, the incriminating exhibits found by PW6 on the said table were wholly under the custody and control of the accused. The said exhibits were clearly under the care of the
D accused and the accused had knowledge of the existence of them. Further, the accused was meddling with the said exhibits on the table. It was also apparent that the accused had the power of control over the said exhibits. (paras 16 & 19)

E **(2)** PW6's failure to mention that he saw the accused meddling with the exhibits on the table in his police report was not a contradiction but only an omission by him to include it in his police report. Such omission does not immediately mean that the witness was no longer credit worthy, rendering his entire
F testimony unreliable. There was clearly no omission in the fundamental details of the fact that the drugs were found on the table directly in front of the accused and that the accused was the one and only person in proximity to the dangerous drugs. The court was still left with the reliable evidence of PW6
G and the corroborative element in exh. P16. There could be no doubt that the accused was aware of the incriminating exhibits in front of him and he had control over the said exhibits in all the circumstances of the case. *Herchun Singh & Ors v. PP* (refd); *PP v. Mohd Bandar Shah Nordin & Anor* (foll); *Lee Ah Seng &*
H *Anor v. PP* (refd). (paras 22, 23, 30, 33 & 34)

(3) The accused had not discharged the onus that by his conduct he had knowledge of the drugs in the red plastic bag and Levi's sling bag as contended by the prosecution. The accused was
I indeed having in his possession the said two bags containing the incriminating drugs. As the total weight of the drugs which

formed the basis of the first charge proffered against the accused exceeded the minimum statutory weight of 15 grammes as provided by s. 37(da)(iii) of the DDA, the prosecution had correctly relied on this presumption in so far as the first charge was concerned. (paras 37, 38, 39, 40 & 41)

(4) At the end of the prosecution's case, upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case on the first and third charge proffered against the accused within the meaning of *Looi Kow Chai & Anor v. PP* and *PP v. Mohd Radzi Abu Bakar*. (para 42)

(5) Upon the totality of the evidence, the defence of the accused was a simple denial of having possession of the said incriminating exhibits. Such denial was insufficient without other proof to reasonably dislodge the prosecution's case. The defence posited by the accused had not created a reasonable doubt on the prosecution's case on the first and third charge on which his defence was called. The defence of the accused had failed on the balance of probabilities, to rebut the statutory presumption under s. 37(da)(iii) of the DDA 1952 with respect to the first charge. The prosecution had proved the offences against the accused in respect of the first and third charge beyond a reasonable doubt. The accused was thus found guilty and convicted of the offences in respect of the said two charges. *DA Duncan v. PP* (refd); *Mohamed Yatin Abu Bakar v. PP* (refd). (paras 50, 70 & 71)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(foll)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
DA Duncan v. PP [1980] 1 LNS 12 FC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamed Yatin Abu Bakar v. PP [1949] 1 LNS 50 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(foll)***
PP v. Chan Ah Kow & Anor [1988] 2 CLJ 821; [1988] 2 CLJ (Rep) 186 HC ***(foll)***
PP v. Lee Eng Kooi [1993] 2 CLJ 534 HC ***(dist)***

A *PP v. Mohd Bandar Shah Nordin & Anor [2004] 1 LNS 574 HC* ***(refd)***
PP v. Mohd Bandar Shah Nordin & Anor [2008] 4 CLJ 859 CA ***(foll)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Samundee Devan Kerishnan Muthu v. PP [2009] 1 CLJ 498 CA ***(foll)***
Wong Nam Loi v. PP [1998] 1 CLJ 37 CA ***(refd)***

B **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 6, 12(2), 37(da)(iii), 39A(1), (2), B(1)(c), (2)
Evidence Act 1950, ss. 8, 9

C *For the prosecution - Mohd Ashrof Adrin Kamarul DPP*
For the appellant - Azmi Juewani; M/s Azmi Juewani & Assocs

Reported by Susheila Sreedharan

D

JUDGMENT

Ahmadi Asnawi JC:

[1] Three charges were levelled against the accused:

E (i) Under s. 39(B) (1)(c) of the Dangerous Drugs Act ('DDA'), 1952 for trafficking in 45.08 grammes of monoacetylmorphines and punishable under s. 39B(2) of the same Act.

(ii) Under s. 6 of the DDA for having in his possession 83.79
F grammes of cannabis and punishable under s. 39A(2) so of the same Act; and

(iii) Under s. 12(2) of the DDA for having in his possession 5.43 grammes of methamphetamine and punishable under s. 39A(1)
G of the same Act.

[2] The three offences were alleged to have been committed at house No. 33, Kampung Parit Tegak, Parit Sulong, Batu Pahat, Johor at about 11.30am on 24 July 2005.

H **[3]** The accused was acquitted and discharged of the second charge at the close of the prosecution's case. There is no appeal in respect of this acquittal by the learned public prosecutor. Hence in this judgment I will focus only upon the first and third charge.

I

Case For The Prosecution

[4] Acting upon information received, on 24 July 2005 at about 10.50am, PW6 (DSP Teng Chan Chew) together with his team of officers raided house No. 33, Kampung Parit Tegak, Parit Sulong, Batu Pahat. They went in a police van. They stopped their vehicle about 20 to 25 meters away from the said house. They went on foot through 'kawasan kebun kelapa sawit' and reached the rear portion of the said house.

[5] Thereat, PW6 saw a man sitting on an overturned bucket/pail infront of a table. The table was facing the rear wall of the said house. A green table cloth covered the entire table. The table, table cloth and bucket were seized by PW6. Exhibit P5(1) shows the photograph of the said table and bucket. Exhibit P5(2) shows the green table cloth spread over the said table. The original position of the table as recreated by the investigating officer (I.O) of the case, PW7, with the assistance of PW6 is as shown in the photograph exh. P4(2). 'O' in exh. P4(2) was drawn by PW6 to show where the overturned bucket was and 'X' was where the man was seated on the overturned bucket when he first saw the man.

[6] Positional wise, PW6 said that the man was seated on the overturned bucket infront of the table facing the rear wall of the house. In turn he was facing the man's back.

[7] PW6 and his team next approached the man from the rear. He grasped the man's left arm and identified himself. The man appeared shocked and stunned. The man is the accused. On the table were several items suspected by PW6 to be prohibited items. He found and seized the following items on the table:

1. One red plastic bag (exh. P6A) containing:

   1.1 One large transparent plastic packet containing yellowish substances suspected to be heroin (exh. P6B).

   1.2 One small transparent plastic packet containing yellowish substances suspected to be heroin (exh. P6C).

   The original state of these packets are as shown in the photograph, exh. P5(3).

A 2. One sling bag carrying the 'Levi's' brand name (exh. P7A) containing:

2.1 10 transparent plastic packets and inside the plastic packets were 10 white plastic 'ubat' containing yellowish substances
B suspected to be heroin (exhs. P7B (1 to 10))

2.2 9 transparent plastic packets containing yellowish substances suspected to be heroin (exhs. P7D (1 to 9))

The original state of these packets are as shown in the
C photograph, exh. P5(4).

Items 1.1, 1.2, 2.1 and 2.2 enumerated above formed the basis of the first charge levelled against the accused.

2.3 One white plastic packet 'ubat', exh. P7F(1). Inside this
D packet were 5 transparent plastic packets containing substances suspected to be syabu (exhs. P7F (2 to 6)).

The original state of these packets are as shown in the photograph, exh. P5(5).

E

These items formed the basis of the third charge levelled against the accused.

2.4 One white plastic packet 'ubat' containing dried plant
F materials suspected to be cannabis (exh. P7H).

2.5 RM1,100 in various denominations (exh. P11).

3. Plastic sealer carrying the 'Impulse Sealer' brand name (exh. P9A).

G

4. Two pairs of scissors (exh. P9B (1 and 2)).

5. Two bundles of small transparent plastic packets totalling 452 pieces altogether (exh. P9B (1 and 2)).

H **[8]** The photograph showing the plastic sealer, two pairs of scissors and the two bundles of plastic packets is exh. P5(8).

[9] The accused next pointed to PW6 the piles of firewood underneath the kitchen portion of the house. At the place pointed
I by the accused beneath the piles of firewood, PW6 retrieved a red

plastic bag (exh. P8A) containing a block of compressed plant materials suspected to be cannabis wrapped in aluminium foil and further wrapped with a transparent plastic sheet.

[10] The original state of this exhibit is as shown in the photograph exh. P5(7). The said piles of firewood are shown in photographs exh. P4 (4 and 5). 'X' in exh. P4(5) was drawn by PW6 to show exactly where he retrieved the said exhibit from after the accused pointed the location to him.

[11] This item and item 2.4 above formed the basis of the second charge levelled against the accused.

[12] There were no other incriminating exhibits recovered elsewhere inside or outside the house or within the vicinity of the house.

[13] At about 1.30pm the accused together with the incriminating exhibits were brought back to Balai Polis Batu Pahat. A report relating to the arrest of the accused and the seizure of said exhibits was lodged by PW6 as per Parit Sulong Report No. 1135-1136/05, exh. P16.

The Nature Of The Drugs

[14] The chemist, PW5, examined these exhibits submitted to him by the I.O of the case. At the end of his examination he concluded that the exhibits consisted of 45.08 grammes of monoacetylmorphines, 5.45 grammes of methamphetamine and 83.79 grammes of cannabis. He also testified that monoacetylmorphines and methamphetamine are both listed in the first schedule of the DDA, 1952 and the cannabis were cannabis within the definition of s. 2 of the same Act.

[15] I have no hesitation in accepting the said findings by the chemist. There were no apparent infirmities in the tests conducted by him. In addition his evidence and findings were not challenged by the defence.

Custody And Control

[16] Upon the facts and evidence adduced, I find as a fact that in so far as the first and third charge is concerned the incrimination exhibits found on the table were wholly under the custody and control of the accused.

[17] The accused was found seated in front of the incriminating exhibits and was directly facing the exhibits. He was seated there alone. The other occupant of the house, ie, his late mother was inside the house. His two brothers were also inside the house and both were also arrested inside the house for investigation in connection with other offences. The accused was at the scene of the seizure of the drugs with no one else. It was suggested by learned counsel that a villager, one Wak Pandi, was also there. This however was dismissed by PW6. According to PW6 if Wak Pandi was there he would also have arrested Wak Pandi. I accepted the denial by PW6 of the presence of Wak Pandi at the scene of the arrest of the accused and seizure of the said exhibits.

[18] PW6 added that he saw the accused meddling (PW6 used the word 'menguruskan') with the exhibits on the table just before he grasped the accused's arm. PW6 also said that the accused appeared shocked and stunned after he identified himself to him.

[19] Upon the facts and circumstances enumerated above I harboured no doubt at all that the incriminating exhibits found by PW6 on the said table were wholly under the custody and control of the accused. In all the circumstances of the case it is apparent that the said exhibits were under the care of the accused and that the accused had knowledge of the existence of the said exhibits. I am fortified in my view by the evidence that the accused was meddling with the said exhibits on the table. It is also apparent that the accused had the power of control over the said exhibits. It is trite law that care, knowledge and power of control over the exhibits constitutes custody - see *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] MLJ 28 at p. 29.

[20] Additionally the accused did not deny that he was sitting infront of and facing the table in the manner described by PW6. His only contention was that the drugs in the red plastic bag (exh. P6A) were not on the table but was found by the police elsewhere on the ground a few feet away from the table. However this is not substantive evidence. It remains a proposition by the defence. I have no reason to doubt PW6's credit worthiness. Hence I accepted his evidence that the drugs forming the basis of the first and third charge levelled against the accused were in fact found on the table as testified by PW6.

PW6's Police Report, exh. P16

[21] It was urged upon me by learned counsel that PW6's evidence that he saw the accused meddling with the incriminating exhibits on the table should be discarded on the grounds that there was no mention of the same in his police report, exh. P16. He is not a credible witness as his evidence was contradicted by this own police report. He quoted *PP v. Mohd Bandar Shah Nordin & Anor* [2004] 1 LNS 574, where the learned judge had acquitted and discharged both accused on grounds of material inconsistency between the evidence in court of PW3 and the statement in his police report that he himself had lodged after the arrest of the accused ie, exh. D20. The learned judge even allowed learned counsel's application to impeach the credit of PW3.

[22] However in my view in this case before me, PW6's failure to mention that he saw the accused meddling with the exhibits on the table in his police report is not a contradiction. It is only an omission on the part of PW6 to include the same in his police report. His police report is only a record of the arrest of the accused and the seizure of the exhibits. The police report is neither an encyclopedia nor substantive evidence. It need not contain minute details of what he did in effecting the arrest and seizure of the exhibits. The details are to be presented in court if at all the case goes to court and is to be subjected to the court's scrutiny and tested against other evidence gathered in so far as its veracity is concerned - see *Herchun Singh & Ors v. PP* [1969] 1 LNS 52 at p. 55. Hence in my view the failure by the witness to mention such details in his police report can never amount to a contradiction and ought not to be treated as such.

[23] Equally such omission does not immediately attract the rule that the witness is no longer credit-worthy, rendering his entire testimony unreliable. It requires more that such mere omission to destroy the credibility of the said witness.

[24] Learned counsel omitted to alert the court that the decision of the High Court in the case of *PP v. Mohd Bandar Shah Nordin & Anor (supra)* has been overturned by the Court of Appeal, as reported in *PP v. Mohd Bandar Shah Nordin & Anor* [2008] 4 CLJ 859, where the appeal by the learned public prosecutor was allowed and both the accused persons has now been ordered to enter their

A defence on the original charge. At held no (1) and (2), the Court of Appeal offered their reasons, which are most pertinent to the issues now ventilated before me:

> (1) Having read and reread both PW3's evidence at the trial and exh. D20, we are satisfied that objectively speaking he was a witness worthy of credit. The discrepancies are in truth nothing more than mere omissions. As was said in *Muthusamy v. PP* 'a mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence'. Accordingly, the learned judge misdirected himself in a material particular when impeaching the credit of this witness (paras 3-5)
>
> (2) In approaching issues of credibility, a trier of fact must always bear in mind the tests applicable when evaluating oral evidence, including motive and probabilities of the case. On the facts, the learned judge had quite rightly found no evil motive on the part of PW3. His sole ground for rejecting the evidence of this witness as wanting in credibility was the contradictions between his evidence and the contents of exh. D20. Unfortunately, the learned judge did not direct his mind to this critical question: was the evidence of PW3 so improbable that it warranted to be given no weight whatsoever? This was a serious misdirection on the part of the learned judge (paras 6 & 7)

[25] This ruling clearly entrenched the general principle that discrepancies in the evidence of the witness (PW6) as against his statement in his police report (exh. P16) are normally to be treated as mere omissions without more. Here exh. P16 was designed to be brief and the larger picture will be presented by the witness while giving evidence during the trial itself. That has been done by PW6. The court should be vigilant in deciding on the credit of PW6 in concluding the weight to be attached to his evidence to avoid any possible misdirection. On the facts in my view there is nothing so improbable in the evidence of PW6 that it warranted to be given no weight whatsoever.

[26] While still on the issue of the credit of PW6 that is now being challenged by the defence, reference is made again to the case of *Herchun Singh & Ors v. PP (supra)* at p. 55 as follows:

> In short, it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached. It can only be used for that purpose with

discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance, nor omissions, objectively considered in the light of surrounding circumstances.

[27] Based on the evidence of PW6, it is abundantly clear that the accused was the only person in proximity to the incriminating drugs. There were also hundreds of pieces of new, unused, small plastic packets right next to the drugs together with a sealer machine generally used to pack items and seal them in the plastic packets. Thus, in the light of the surrounding circumstances adduced by the prosecution, the omission by PW6 to state in his police report (exh. P16) that he saw the accused meddling with the exhibits on the table should not be given exaggerated importance when compared to all the other evidence adduced. The omission by PW6 to state the same in his police report did not occasion a damage to his credibility as a whole. As enunciated in the case above, the police report by PW6 should instead be taken as collateral proof of SP6's account of the facts leading to the arrest of the accused and seizure of the said exhibits.

[28] Reference should also be made to the decision of the Federal Court in *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 at p. 2 where it was stated:

(1) Of the discrepancies, the most prominent and significant was SP7's omission to mention in the FIR the involvement of the appellants and the alleged pursuit of Sanip after he came out of his shack. The omission was not one of mere detail but of the important second half of the events that were related in evidence. The deliberate failure of SP7 to mention in the FIR the second half of the incident, including the appellants' involvement in it, should have given cause to the learned trial judge to be very careful about accepting SP7's evidence of the appellants' complicity in the crime. Of course if there was a reasonable explanation for the failure, It should not have any effect on the veracity of SP7".

[29] The omission in the case above was an omission of important details involving the identity of the assailants as well as the facts of the attack against the deceased. However, in the case before me, the omission by PW6 is only in connection with the act of the accused during the arrest and seizure of the exhibits. There is clearly no omission on the part of SP6 in regards to the

A fundamental details of the fact that the drugs were found on the table directly in front of the accused and also the fact that the accused was the one and only person in proximity to the dangerous drugs forming the substance of the first and third charge.

B **[30]** Although the issues in *Herchun Singh (supra)* and *Lee Ah Seng (supra)* were in respect of FIRs, I think the principles enunciated in both the cases applies with equal force to other police report lodge by any party other than FIR.

C **[31]** Learned counsel also referred to the case of *PP v. Lee Eng Kooi* [1993] 2 CLJ 534 where Vincent Ng JC (as he then was) had acquitted and discharged the accused in that case. However the grounds were:

> [5] If in a case the prosecution leads two sets of evidence, each
D one of which contradict and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Inevitably, the accused would have the benefit of such a situation.

E

[32] In this case above, the prosecution had regrettably created two different versions of how and where the weapons which formed the basis of the charge were found. One was that it was found on the accused while the other was that it was found outside of the house
F encased in steel cylinder.

[33] However in the case before me it is abundantly clear that the said incriminating drugs were found on the table where the accused was sitting and facing as testified by SP6 and in his police report
G exh. P16. The only issue is that PW6 had failed to mention in exh. P16 that the accused was meddling with the said drugs and not merely sitting and facing them. Thus, quite clearly this is not two sets of evidence adduced by the narrative of the prosecution but merely a minor discrepancy which is in actuality more of an
H omission on the part of PW6. The court is still left with the reliable evidence of PW6 and the corroborative element in exh. P16. Hence, the principle in the case of *PP v. Lee Eng Kooi (supra)* is not relevant to the case before me. It is easily distinguishable.

I

[34] Here the prosecution is relying solely on the evidence of PW6 that is somewhat corroborated by his police report in exh. P16. As there is no requirement in law to corroborate the evidence of PW6, the fact that there is only one minor discrepancy in exh. P16 does not attach any lesser weight to be given to the evidence of PW6. If the evidence of PW6 shall be believed, then his sole evidence will be sufficient to establish the fact that the accused was meddling with the said exhibits at the relevant time and place. Hence, there is no need for the evidence of PW6 to be corroborated by the contents of exh. P16 - see *Balachandran v. PP* [2005] 1 CLJ 85 at p. 94. On the facts I have no hesitation in accepting the evidence of PW6.

[35] In *PP v. Chan Ah Kow & Anor* [1988] 2 CLJ 821; [1988] 2 CLJ (Rep) 186; p. 189, KC Vohrah J stated:

> At the dose of the case for the prosecution on a *prima facie* basis it seems unarguable that it was the second accused riding the motorcycle. The exposed basket attached to the front body of the motorcycle lay suspended between his legs and in this basket, unconcealed, was the red translucent plastic bag containing 4 packages weighing over 1.7 kilos. There can be no doubt he was aware of those 4 packages, he was in close proximity to them, he was nearest to them and to my mind he had control over them when viewed with the other circumstances of the case.

The facts of the case before me were on all fours. The accused was seated infront of the table and facing the table where the incriminating exhibits were laid on the table. He was in close proximity with the exhibits and was nearest to the exhibits. The red plastic bag was not concealed. Neither was the Levi's sling bag. There were other paraphernalia connected with drug trafficking activities on the table ie, the plastic sealer, the two pairs of scissors and 452 pieces of new, unused small plastic packets. In my mind there can be no doubt that the accused was aware of the incriminating exhibits in front of him and he had control over the said exhibits in all the circumstances of the case.

Knowledge

[36] PW6 survived the test of cross-examination. His evidence in connection with the arrest of the accused and seizure of the incriminating exhibits was largely intact though vigorously challenged. The red plastic bag and Levi's sling bag were found on

A the table. It was not hidden/concealed. There were other paraphernalia on the table. He was in close proximity to them. He was nearest to them. He was seen meddling with the exhibits. He was alone with the said incriminating exhibits and the paraphernalia.

B

[37] The accused, on the facts must have been seized with the knowledge that the red plastic bag and the Levi's sling bag contained the drugs that are now the subject matter of the first and third charge levelled against him. Admittedly there is no direct C evidence imputing such knowledge on the part of the accused. But then the law is trite. Knowledge though cannot be proved by direct evidence, however could be inferred from the set of facts, evidence and circumstances surrounding the particular case - see *Parlan Dadeh v. PP* [2009] 1 CLJ 717; *Emmanuel Yaw Teiku v. PP* [2006] D 3 CLJ 597; *Wong Nam Loi v. PP* [1998] 1 CLJ 37; *Samundee Devan Kerishnan Muthu v. PP* [2009] 1 CLJ 498. On the facts and evidence I have no doubt that the accused must have known that the said bags contained the said incriminating exhibits. This is the only logical inference that can be inferred from the set of evidence E adduced - see *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, paras 19, 20, 21 and 25 (pp. 351 - 353).

[38] The conduct of the accused is of no help either. PW6 testified that the accused appeared shocked and stunned after he F introduced himself to him as a police officer. Learned DPP submitted that this conduct is relevant to show that the accused had knowledge of the drugs in the red plastic bag and the Levi's sling bag placed on the table nearest to him. Otherwise he would not have reacted in that fashion. I am entirely with him. The G conduct of the accused as seen and perceived by PW6 is obviously admissible under s. 8 of the Evidence Act 1950. The onus is now upon the accused to explain his conduct pursuant to s. 9 of the Evidence Act 1950, with a reasonable fullness of detail and circumstance - see *Parlan Dadeh v. PP (supra)* at pp. 746 to 747, H para 36. On the facts and evidence I am satisfied that the accused has not discharged the onus that by his conduct he had knowledge of the drugs in the red plastic bag and Levi's sling bag as contended by the prosecution.

I

Possession

[39] The prosecution having proved that the accused had custody/control and knowledge of the contents of the red plastic bag and Levi's sling bag, it is my further findings that the accused was indeed having in his possession the said two bags containing the incriminating drugs. On the facts he was well endowed with powers to dispose off the said drugs. Having custody/control, knowledge and powers of disposal are the elements constituting possession. Hence in *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] MLJ 237, p. 239 it is stated:

> A movable thing is said to be in the possession of a person when he is so situated to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

Additionally at para. 21 in *PP v. Abdul Rahman Akif (supra)* it is stated:

> [21] In the same case Lord Morris answered the question in the following manner:
>
> > If there is assent to the control of a thing, either after having the means of knowledge of what the thing is or contains or being unmindful whether there are means of knowledge or not then ordinarily there will be possession. If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession. If however, someone deliberately assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it is in possession of the box but not in possession of the things in it. If he has been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them ...

A **The Statutory Presumption**

[40] The total weight of the monoacetylmorphines enumerated in paras 1.1, 1.2, 2.1 and 2.2 which formed the basis of the first charge profferred against the accused obviously exceeded the
B minimum statutory weight of 15 grammes as provided by s. 37(da)(iii) of the DDA. It shall thus be presumed that the accused was trafficking in the said drug until the contrary is proved. On the facts the prosecution had correctly relied on this presumption in so far as the first charge is concerned.

C **[41]** The third charge is only in respect of possession of the said drugs. The statutory presumption does not apply. Prove of possession of the same has been discussed in the earlier paragraphs.

***Prima Facie* Case**

D **[42]** It is thus my findings that at the end of the prosecution's case, upon a maximum evaluation of the evidence adduced, the prosecution had made out a *prima facie* case on the first and third charge profferred against the accused within the meaning of *Looi*
E *Kow Chai & Anor v. PP* [2003] 1 CLJ 734 and *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. Should the accused remain silent, the evidence adduced is sufficient to warrant his conviction. The accused was ordered to enter his defence. He opted to testify on oath.

F **The Defence Case**

The Evidence Of The Accused

[43] That morning he was asked by his late mother to fertilise the
G palm oil trees. He began at about 7am and by 11am he got his job done. He went home and went inside the house to take some refreshments. Next he wanted to smoke. He went outside and sat on the overturned bucket shown in exh. P4(2). The position of the overturned bucket and the table were as shown in the said
H photograph exh. P4(2). He sat facing the side of the house. He saw the Levi's sling bag (exh. P7A), the plastic sealer, two pairs of scissors and the empty plastic packets on the table at the far right. He had no knowledge of the contents of the Levi's sling bag. The sling bag was not his. Neither were the plastic sealer, the two pairs
I of scissors and the hundreds of plastic packets. He denied meddling with the exhibits on the table.

[44] The accused added that about five minutes after he was seated on the overturned bucket, two men suddenly came from his rear, snarled ('sergah') at him and immediately handcuffed him. Soon after five to six more persons came and proceeded to search the rear portion of the house.

[45] One of the search party found and picked up a red plastic bag (exh. P6A) from underneath the house ('kolong rumah') about four feet away from the table. The accused marked the place where the said red plastic bag was picked up with the letter 'Y' in exh. P4(2). In the photograph, the 'Y' is located beneath the red plastic chair.

[46] The accused further added that the party also searched the piles of firewood underneath the kitchen portion of the house. One of them found a red plastic bag (exh. P8A) hidden within the piles of firewood.

[47] The accused also said that at the time of his arrest Wak Pandi (DW4) was there too. At that time Wak Pandi was about 30 feet away digging a trench in the 'kebun sawit'. He was hired by his late mother to do the job. Wak Pandi then came to where he was handcuffed and spoke with the persons standing guard over him. Wan Pandi was allowed to go free. The accused also said he saw his two brothers (DW2 and DW3) also arrested by the raiding party.

[48] The accused contended that at the time of his arrest, he was smoking his cigarette while seated on the overturned bucket. He was not shown the contents of the Levi's sling bag (exh. P7A), the contents of the red plastic bag (exh. P6A) found from underneath the house ('kolong rumah') and the contents of the red plastic bag (exh. P9A) found from within the piles of firewood underneath the kitchen portion of the house.

[49] The accused denied knowledge of the contents of these bags, these bags were not his and were never in his possession. He also denied meddling/handling/wrapping the exhibits found on the table. This is the essence of his defence.

[50] However it is my findings that the defence of the accused is essentially one of bare denial.

[51] Much was submitted by learned counsel that the accused's testimony that he had just come back from the 'kebun', went inside the house and took refreshments and was resting and having his smoke for about five minutes before he was accosted and arrested by PW6, was not challenged by the prosecution. This would then amount to accepting the said evidence. This goes to show that he was an innocent by-stander. He had nothing to do with the exhibits as he was away in the kebun since 7am that day and by the time he came back to the place, the exhibits were already there on the table. The place where the exhibits were found is an open area and his two brothers also used to frequent the place. What was proved was only his proximity to the exhibits on the table, *albeit* temporarily, when he sat on the bucket to smoke.

[52] However, I could find no truth in this defence. It was not suggested to PW6 that the accused was at the kebun since 7am that morning and came back at about 11am to have his refreshments. This is the backbone of his defence. Equally, it was not suggested that he was there only for about five minutes before being accosted by PW6 and his men. It appears that the accused was keeping the essential ingredients of his defence up his sleeves. But the law is trite. The accused is to set up his defence at the earliest possible stage. Otherwise it would incur the ruling that it is a recent invention. On the facts I have no doubt that it was so.

[53] Additionally it is apparent that the accused had contradicted himself regarding his testimony that he was only there for about five minutes and smoking before PW6 and his men sprung at him from his rear. However, in his cross-examination he was very emphatic that he was accosted and immediately arrested by PW6 and his men as soon as he sat on the overturned bucket leaving him with no time to examine the exhibits on the table though he had all the intention to do so. Conversely that would also leave him with no time to light up and smoke. In the light of the said contradiction the evidence as regards to the duration he was seated on the bucket whether for about five minutes or less is obviously a red herring.

[54] As indicated in the photograph exh. P4(2), there was a comfortable red plastic chair complete with back rest near the table. Logic would have suggest that this chair would offer a better place to rest and smoke rather than to rest on an overturned bucket.

Hence in my view it is apparent that the purpose of the accused sitting on the overturned bucket has got everything to do with his possession of the said exhibits on the table. It is consistent with PW6's testimony that when he approached the accused from the accused's rear, he saw the accused seated on the overturned bucket directly infront of the table, facing the incriminating exhibits placed on the table and meddling with the exhibits. In exh. P4(2), PW6 drew 'O' as the place where the overturned bucket was and 'X' as the place where the accused was seated on top of the overturned bucket.

[55] Even if it is true that the accused was seated on the overturned bucket at the left edge of the table and facing the rear wall ('dinding') of the house as shown in exh. P4(2), the exhibits were still very close to him. He saw the exhibits on the table minus the red plastic bag, exh. P6(A). In his own words he was there only for about five minutes before he was accosted by PW6 and his men. In my view that five minutes would afford him more than sufficient time to examine what the exhibits exactly were and took action to disassociate himself from the exhibits, like fleeing from the scene and contacting the police or throwing the exhibits away. This would be the most logical thing for him to do. But the accused did none of these. The conduct of the accused indeed belied his innocence.

[56] Learned counsel repeated his submissions that the fact that there was no mention in PW6's police report (exh. P16) of the accused meddling/wrapping the exhibits on the table merely fortified the accused's testimony that he was merely there doing nothing, caught at the wrong place at the wrong time, without any inkling of the contents of the Levi's sling bag and the other exhibits on the table, thus creating a real doubt whether the said exhibits were in the possession of the accused or at all. However I have dealt with this issue at length in the preceding paragraphs. I have no wish to repeat it here. Suffice to say that I accepted PW6's evidence that he saw the accused meddling ('sedang menguruskan barang-barang kes atas meja') with the exhibits on the table just before the accused was apprehended. His omission to include the same is not fatal to the prosecution's case. The issue is rather minor in all the circumstances of the case to have had created an adverse impact on the prosecution's case.

[57] Next the accused said that after his arrest he was moved to the side of the house. One of the police party found a red plastic bag (exh. P6A) from underneath the house ('kelong rumah') at point Y drawn by the accused himself. Hence there can be no possession in so far as the said plastic bag (and its contents) is concerned. However this evidence was contradicted by his own witness, DW3.

[58] DW3 is the accused's elder brother. He worked as a lorry driver. He was not working on the day in question. He stayed together with his late mother, DW2 and the accused at the said house. He testified that he was arrested by the police on that day while watching television in the main hall of the house. He was next taken to the verandah of the kitchen portion ('anjung dapur') of the house. He was asked to sit at this portion of the house. There was a window at this portion of the house. Before he sat down, he stood at this window facing outside the house. He marked the place where he stood at this window with the letter 'Z'. While standing there he saw a policeman standing at the place he marked 'Z1'. Soon after, this policeman whom he could not identify stooped low and picked a red plastic bag at the location he marked 'Z2'. This red plastic bag presumably is the same plastic bag (exh. P6A) referred to by the accused as that found by the police at the location 'Y' drawn by the accused in exh. P4(2) and referred to by PW6 as the one he saw and later seized on the table. Except for exhs. P6A and P8A no other red plastic bags were recovered by the police in this case. Thus this could not have been the red plastic bag (exh. P8A) recovered from underneath the piles of firewood by PW6 as the location of the recovery of this red plastic bag was never disputed by the accused.

[59] The contradiction in respect of the location of the recovery of the said red plastic bag (exh. P6(A) in the testimonies of the accused and his own witness, DW3, is just irreconcilable. They were poles apart on a common issue which formed the backbone of the accused's defence in so far as the first charge is concerned. In the event in my view both the accused and DW3 were lying. On the other hand the evidence of PW6 that he found the said red plastic bag (exh. P6A) on table together with the Levis sling bag and other paraphernalia remained intact. I have thus no hesitation in accepting the evidence of PW6 in respect of the same. Tested

against all the evidence available, in all the circumstances of the case, his evidence is a lot more probable than that evinced by the accused and his witness, DW3.

[60] Now, much was said about the presence of Wak Pandi (DW4) in learned counsel's submission. I will now deal with Wak Pandi.

[61] DW4 testified that he was then staying with a relative about four houses away from the accused's house. He knew the accused. At the material time he was digging a trench not very far from the accused's house. He was hired to do so by the late mother of the accused. He heard a commotion at the accused's house. He went nearer to the house to see what the commotion was all about. He stood about 25 feet away from the accused's house. He saw the accused already handcuffed and guarded by a policeman. This same policeman then came to him and asked him what he was doing there. He replied that he was digging a trench. He was then asked to go away by the policeman. He obliged and left the place.

[62] DW3 confirmed the presence of DW4 about 30 feet away from his house. DW2, the accused's younger brother, also confirmed the presence of DW4. This is about the only notable feature that can be gathered from DW2's testimony.

[63] I have scrutinized the evidence of DW4. He is a neutral witness. He did not add value either to the prosecution's case nor to the defence.

[64] If the purpose of calling DW4 is to discredit PW6's evidence on account of PW6's denial of the presence of DW4, then I think they have miserably failed to do so. He was not at the scene of the arrest of the accused and the seizure of the exhibits. He came to about 25 feet away from the house, whatever that means and left when asked to go by one of the policeman. Equally DW4 was not at the scene of the accused's arrest and seizure of the exhibits prior to or at the time of the arrest of the accused and seizure of the exhibits. He came into the picture only after it was all over, *albeit* about 25 feet away from the said house. When he came he saw the accused already handcuffed. He knew nothing about the events prior to or at the time of the arrest of the accused and seizure of the exhibits.

[65] In such scenario, PW6 was correct when he said that at the time of the arrest of the accused and seizure of the exhibits, DW4 was not there at the scene. DW4 was digging the trench in the 'kebun kelapa sawit' at the material time. Hence DW4 is not an issue at all, capable of casting doubt and bringing down the prosecution's case.

[66] Equally DW2 and DW3 knew nothing about the events prior to or at the time of the arrest of the accused and seizure of the said exhibits. They were upstairs in the house at the material time.

[67] Additionally DW4 had contradicted the accused's testimony that he (DW4) had approached him and the group of policemen standing guard over him and had spoken with the said group of policemen. DW4 had only said that there was only one policeman guarding the accused and this same policeman came to where he was standing (25 feet away from the house) and told him to go away after asking him what he was doing there. In turn DW4's evidence was contradicted by the evidence of the accused and DW3 where both of them said that there were four to five policemen standing guard over the accused.

[68] What can be gathered and concluded from the testimonies of the witnesses for the prosecution and for the defence is this - that at the time of his arrest, the accused was alone seated on the overturned bucket infront of the table facing the said incriminating exhibits and paraphernalia laid on the table and meddling with the said exhibits.

[69] PW6 and the I.O in my view were truthful witnesses. Having regard to the whole circumstances of the case their testimonies were not something which is improbable. Equally there is nothing inherently improbable with their testimonies. They were public officials with no motive to propel them to testify adversely against the accused.

Findings

[70] Upon the totality of the evidence I am with the learned TPR's submissions that the defence of the accused is a simple denial of having possession of the said incriminationg exhibits. Such denial is insufficient without other proof to reasonably dislodge the prosecution's case - see *DA Duncan v. PP* [1980] 1 LNS 12.

[71] At this stage the business of the court is to consider whether the evidence of the accused and his witnesses has thrown a reasonable doubt on the truth of the prosecution's case and, if so, the accused is entitled to an acquittal - see *Mohamed Yatin Abu Bakar v. PP* [1949] 1 LNS 50. Having considered the evidence in its entirety, I am satisfied that the defence posited by the accused has not created a reasonable doubt upon the prosecution's case upon the two charges (first and third charge) upon which his defence was called. Equally the defence of the accused had failed on the balance of probabilities, to rebut the statutory presumption under s. 37(da)(iii) of the DDA, 1952, in so far as the first charge is concerned. The prosecution on the other hand, had proved the offences against the accused in respect of the first and third charge beyond a reasonable doubt. The accused is thus found guilty and convicted of the offences in respect of the said two charges.

[72] Accordingly he is sentenced to hang by rope by his neck until he is dead in respect of the first charge. As regards to the third charge he is jailed for three years to run with effect from the date of his arrest and also given three strokes of the rotan.